IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1976

No. 76-96

BERNARD ZELDIN,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

---

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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The Defendant-Petitioner, BERNARD ZELDIN, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, entered on May 24, 1976.

## OPINIONS BELOW

The Opinion of the Court of Appeals is not yet reported but is printed in Appendix A hereto.

## JURISDICTION

The judgment of the Court of Appeals, printed in Appendix A hereto, was entered on May 24, 1976. Petition for rehearing was denied and filed on June 28, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether, under the rulings in Rochin v. California, 342 U.S. 165 and United States v. Russell, 411 U.S. 423, the conduct of the Government in this case was so outrageous that the Court of Appeals should have reversed the conviction of Petitioner and ordered the dismissal of the indictment on due process grounds, or at the very least, have excluded all evidence procured from the Mizera wiretap after May 19th?

2. Whether by virtue of the violation of the provisions of the Fifth and Fourteenth Amendment to the Constitution of the United States, the Court of Appeals should have ruled that Appellant Zeldin was deprived of due process of law by virtue of the actions of the agents of the State of Nevada in causing legal counsel to abandon a case then under investigation to insure that no person being investigated or being solicited for cooperation would have independent counsel, thereby requiring a reversal of the convictions?

3. Whether, under the rulings in Rathburn v. United States, 355 U.S. 107, and Schneckloth v. Bustamonte, 412 U.S. 218, the Court of Appeals should have decided that Mizera's consent to cooperate and allow monitoring was involuntary, thereby requiring all evidence obtained therefrom and fruits thereof to have been suppressed?

4. Whether, under 18 U.S.C. §§ 2510 through 2520 and under the rulings in Berger v. New York, 388 U.S. 41, and Katz v. United States, 389 U.S. 347, the Court of Appeals should have declared the Nevada wiretap statutes

(NRS 200.610 through 200.690) void on their face, thereby requiring all evidence obtained therefrom and fruits thereof to have been suppressed?

5. Whether, under 18 U.S.C. §§ 2510 through 2520 and under the rulings in Berger v. New York, 388 U.S. 41, and Katz v. United States, 389 U.S. 347, the Court of Appeals should have declared the wiretap orders issued by Judge Batjer on May 4th and May 5th void, thereby requiring all evidence obtained therefrom and fruits thereof to have been suppressed?

6. Whether, under the ruling in Rewis v. United States, 401 U.S. 743, the Court of Appeals should have found that the Travel Act (Title 18, U.S.C. § 1952) did not make the acts alleged to have been committed by Appellant a federal offense thereby causing the prosecution of Appellant Zeldin to be in violation of the Tenth Amendment to the United States Constitution requiring a reversal of the convictions.



## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the Fourth Amendment and the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the Tenth Amendment to the United States Constitution. The federal statutes involved are 18 U.S.C. § 1952 and 2510 through 2520, the pertinent provisions of which are printed in Appendix B hereto. The state statutes involved are the laws of the State of Nevada designated NRS 200.610 through 200.690, which are printed in Appendix C hereto.

## STATEMENT OF CASE

On April 27, 1973, a Federal Grand Jury in the District of Nevada returned a two-count indictment against Petitioner BERNARD ZELDIN and two other individuals (JAMES G. RYAN, a public official of Clark County, Nevada, and ADRIAN WILSON). A fourth person was named as a co-conspirator but was not indicted (MIRO "MIKE" MIZERA).

Count I charged ZELDIN, RYAN and WILSON and unindicted co-conspirator MIRO MIZERA with conspiring to violate the Travel Act (18 U.S.C. § 1952) in violation of Title 18, United States Code, § 371.

Count II charged ZELDIN, RYAN and WILSON with travelling in interstate commerce between California and Nevada and using interstate communication facilities with the intent to promote the unlawful activity of bribery of public officials in violation of various Nevada statutes and, therefore, in violation of Title 18, United States Code, § 1952. Count I charged the defendants with conspiring to commit the substantive offense alleged in Count II.

Petitioner BERNARD ZELDIN entered his plea of not guilty as to each count. Trial was had before a jury in the Federal District Court at Las Vegas, Nevada. Petitioner was convicted as charged and was sentenced to imprisonment for a period of one year and one day as to each count, sentence to run concurrently. In addition, Petitioner was fined



the sum of $10,000.00 as to each count.

Petitioner BERNARD ZELDIN timely filed a Notice of Appeal in the United States Court of Appeals for the NINTH Circuit. The Court of Appeals affirmed the convictions of all three defendants in an opinion by Judge Trask filed on May 24, 1976, which is printed in Appendix A hereto. Thereafter, Petitioner filed a Petition for Rehearing which was denied by the Court of Appeals on June 28, 1976.

## REASONS FOR GRANTING THE WRIT

1. Certiorari should be granted to review the holding of the court below relating to government conduct in this case. The acts and statements of government agents were so outrageous as to violate certain standards of decency in civilized conduct and required the reversal of the convictions gained by such conduct and the dismissal of the indictment.

This Court stated in Rochin v. California, 342 U.S. 165, at Page 69:

"However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conv'ction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.'"

This Court stated in Rochin, at Pages 172 and 173:

"It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained . . . . These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. They



are not sports in our constitutional law but applications of a general principle. They are only instances of the general requirements that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice'."

This Court stated in U.S. v. Russell, 411 U.S. 423, at Pages 431 and 432:

"[W]e may someday be presented with the situation in which the conduct of law enforcement agents is so outrageous that due process would absolutely bar the government from invoking judicial processes to obtain a conviction...."

Petitioner contends that the facts presented to the court below do rise to the level of outrageousness as this Court required in both the Rochin and Russell cases.

The facts which were presented to the court below showed governmental conduct tantamount to that of the most vile police state and incompatible with due process. Petitioner ZELDIN's conviction could not be sustained absent the testimony of MIZERA and the evidence derived from a tape recording made by a body tape on MIZERA at a meeting of May 22, 1972. The trial court found that the MIZERA evidence, referred to above, could not be used unless MIZERA's consent was voluntary. Whether or not MIZERA voluntarily consented becomes particularly important in light of the Court ruling that "MIZERA himself became an independent source of this same evidence after May 19th, when he agreed to cooperate with the authorities and told them all that had gone on prior to that time." (Court of Appeals' Opinion) The Court



of Appeals held evidence obtained from taps on MIZERA's telephone and person after May 19th admissible on the basis of MIZERA's consent (Court of Appeals' Opinion). Whether the consent of MIZERA was voluntary and whether Appellant ZELDIN's due process rights were violated by the government's treatment of MIZERA therefore becomes extremely important and indeed controlling. The Court of Appeals specifically stated that it "does not condone the tactics used to gain MIZERA's cooperation." It is therefor appropriate to turn our attention to whether or not government agents in Nevada practiced fraud, deceit and misrepresentation with reference to the chronically ill and desperately frightened MIZERA. The Court of Appeals recognized that repeated assertions to MIZERA were that he would go to jail for ten years if he refused to cooperate. On what rational basis could government agents say to MIZERA, "I can assure you you'll go to jail for ten years." How dare the agents tell MIZERA that a lawyer may feel MIZERA

is "too insignificant a person to worry about. They may not have your best interest at heart." It is inconceivable that this Court will allow a state agent to advise someone, whom that agent desires to coerce into cooperating, that he will not be important or significant to a lawyer and that the lawyer may not have his best interest at heart. If this activity is allowed to stand, then it seems to be a near fatal blow to the legal profession and the attorney-client relationship. MIZERA was told that he could not get care for his headaches because he would not be able to go back to New York in July. He was then told "there's only one man who can help you at this point and that's the Attorney General." These statements are flat out lies. They assured MIZERA that his friends, Appellant WILSON and Appellant ZELDIN, would be kept "out of it". This was a vicious and unprincipled untruth. No physical blows could have equalled the result of the psychic thrashing that MIZERA took. Broken bones mend and wounds heal, but how can the ordinary human mind remain objec-



tive or responsive when a person is told that either he does what he is asked to do or he will go to prison for ten years; he cannot consult an attorney or he will go to prison for ten years; he is sentenced to ten years of agonizing headaches unless he cooperates. In effect, the above statements were made. MIZERA was coerced. His consent was not voluntary.

Even though such facts raise serious questions of conduct which was tantamount to a destruction of Petitioner's due process rights, the court below still decided that the required level of "outrageousness" had not been reached. This is inconsistent with the Court of Appeals' express statement that it explicitly disagreed with the trial court's characterization that the government's efforts were "excellent and professional police work".

Petitioner contends that the findings of the court below, and its statements of the facts concerning governmental conduct in this case, are "so grossly shocking and so outrageous as to violate the universal sense of justice".

It is apparent that in its decision, the Court of Appeals placed a controlling value on prosecution rather than on preserving the integrity of the constitutional mandate of a fair trial. Petitioner's rights to due process and a fair trial were seriously violated and jeopardized by the government's creative conduct in this case. The threats posed by such conduct were either not properly recognized or were rejected by the Court of Appeals.

This Court should grant certiorari to settle the question of whether the conduct of the government in this case constitutes a violation of due process of law, as guaranteed by the Fifth Amendment,and to prevent similar conduct in the future.

A further reason why this Petition should be granted is that this Court's decisions in Russell and Rochin do not provide lower courts with sufficient guidelines and other standards to determine if due process requires reversal or non-prosecution of an individual due to improper governmental conduct.



The Russell and Rochin standard of "outrageousness" is too vague to be applied by lower courts without further standards and guidelines having been set down by this Court. Thus, the need for this Court to enunciate the standards and principles governing such a difficult situation is plain. This Court's decisions in Russell and Rochin have created a great deal of uncertainty and confusion. Lower court time is being taken to resolve conflicting interpretations of the standards set down by this Court. The question of the proper interpretation should properly be settled by this Court.

The questions presented by this case are of great and recurring significance. The important nature of these issues has already been recognized by this Court as recently as United States v. Russell, 411 U.S. 423. The serious questions of public policy involved here and the effect of the decision below, if unreversed, make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

* * *

2. This Court should grant certiorari to resolve the question of whether the government's conduct in this case, in attempting to sever the attorney-client relationship of Petitioner and his attorney and from attempting to prevent all persons, including Petitioner, from obtaining and benefiting from competent legal counsel, was a violation of the due process clauses of the Fifth and Fourteenth Amendments requiring reversal of the conviction herein.

As stated, supra, in Point 1, governmental conduct can reach a level which requires a reversal of a conviction as a matter of law. Petitioner contends that the government's conduct in this case, including its attempts to keep Petitioner and other persons involved from seeking the advice of counsel, was just such conduct as requires a reversal on due process grounds.

This Court has not passed upon the question of whether conduct by the government in attempting to deny counsel to a person long before judicial proceedings are instigated can result in a



denial of due process.

Petitioner contends that the government's conduct in this case did result in a denial of due process. The Court of Appeals rejected Petitioner's argument by stating that the government's conduct did not reach the level of outrageousness as required by the Russell case. In reality, the Court of Appeals merely bypassed this issue without dealing with it on its merits.

As stated, supra, this case is an appropriate one for this Court to set down further standards to guide lower courts in determining when due process requires reversal of a conviction in the interests of justice.

Petitioner contends that this is a case which fulfills the "outrageousness" standard set forth by this Court. This Court should grant the writ and finally settle this important question of due process.

* * *

3. This Court should grant the writ in order to determine if the Court of

Appeals should have decided that the government informant's consent to cooperate was involuntary, thus requiring suppression of all evidence obtained as a result thereof. The Court of Appeals did not even consider the question that is presented in this case. It merely states in its Opinion that MIZERA "consented" and goes on from that point to use such unsupported consent to bolster its arguments as to other issues.

In truth, and in fact, there still remains the issue whether the ever-so-important MIZERA consent was voluntary under the standard set forth by this Court in Rathburn v. United States, 355 U.S. 107, and Schneckloth v. Bustamonte, 412 U.S. 218.

If the consent was involuntary, many important issues are raised thereby. The Court of Appeals chose to obviate the necessity of having to dispose of such additional issues by by-passing the important "voluntariness" question. Since the "consent" issue was vital to the government's ability to offer its evidence obtained from wiretaps, etc.,



the by-passing of this issue by the court below seriously affected Petitioner's ability to attack the bulk of the evidence which was ultimately presented against him. It is clear that the rationale of the Opinion of the Court of Appeals is based to a substantial degree on MIZERA's consent -- even though the voluntariness of same is never discussed.

It is apparent that the Court of Appeals failed to apply the test laid down by this Court in Rathburn and Schneckloth. As such, improper evidence and fruits thereof were admitted against the Petitioner. The Court of Appeals failed to deal with this issue. A writ should be granted so that this Court can make the important determination the court below failed to make.

* * *

4. This point deals with the validity of the Nevada wiretap statutes and Judge Batjer's wiretap orders which were issued under the auspices of such statutes. It is apparent that if the Nevada law (NRS 200.660), upon which Judge

Batjer relied in making his wiretap orders, is declared unconstitutional, the orders by Judge Batjer must also be seen as invalid requiring the suppression of all evidence and fruits thereof obtained therefrom.

Certiorari should be granted in this case so that the Court can determine if the Nevada wiretap statute and the orders which flowed therefrom comport with the requirements of the federal enabling statutes located at 18 U.S.C. 2510 through 2520, and with this Court's decisions in Berger v. New York, 388 U.S. 41, and Katz v. United States, 389 U.S. 347.

The court below sought to avoid the questions raised by Petitioner and the difficult constitutional questions arising therefrom. The court did so by finding that "consent" existed for the wiretaps used at trial. Thus, the Court of Appeals brushed aside the problems and burdens of the statutory requirements determined to be so important by the Congress of the United States and this Court. Thus, the Court of Appeals ignored the controlling



consideration of the validity of the statutes.

The Court of Appeals avoids the true problem by stating that only "consented-to" tapes were offered at trial. Petitioner contends that the government learned of facts and the existence of certain individuals from tapes that were never offered at trial, but which resulted in the obtaining of information which, in turn, was used at trial.

Thus, the use of "consent" by the court below to avoid determining the validity of the Nevada statutes and Judge Batjer's wiretap orders was in error. The determination of "consent" was not dispositive of the questions presented to this case. The true constitutional question as to this point is not whether consent existed, but whether the Nevada wiretap statutes and Judge Batjer's orders were constitutionally valid.

The court below failed to accord to the federal wiretap statute and this Court's opinions in Berger and Katz, the weight to which a statute and

and decisions of such standing are entitled. Congress pre-empted the field and only if state laws and wiretap orders issued thereunder comport with federal law can they be upheld.

The Court of Appeals did not address the question and disregarded the significance of the requirement of voluntariness.

The Nevada statute fails to comply with federal law in the following respects:

(a) It does not require that an application for an interception order or the order itself be based on probable cause to believe that an individual is committing, has committed or is about to commit a particular offense;

(b) It authorizes an application for a wiretap by a person, the State Attorney General, who is not the principal prosecuting attorney of the state, or any political subdivision thereof, contrary to 18 U.S. Code § 2516(2);



(c) It authorizes a wiretape without any of the limitations required in the order approving such wiretap as set forth in 18 U.S. Code § 2518(4); nor is it limited in duration to the time periods set forth in 18 U.S. Code § 2518(5) of 30 days. Rather, the provision is for a 60 day surveillance period;

(d) It fails to meet the requirements of Berger and 18 U.S. Code § 2518(1) (C) and 18 U.S. Code § 2518(3) (C) which requires a factual showing that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(e) It fails to establish requirements similar to those set forth in 18 U.S. Code § 2518(5) and (6) calling for the minimization of the interception of communications, and a reporting of progress made towards achieving the authorized objective;

(f) It fails to require a

statement in the order delimiting the order to the extent that the interception shall automatically terminate when the described communication has been first obtained, contrary to the provisions of 18 U.S. Code § 2518(4)(e); nor does it require a statement in the order structuring the conduct of the interception in such a way as to minimize the interception of other conversations as required by 18 U.S. Code § 2518(5);

(g) It fails to require the factual showing called for by 18 U.S. Code § 2518(1) and (2);

(h) It permits the conduct of surveillance under an order for a maximum period of 60 days violating 18 U.S. Code § 2518(5) and is productive of that evil which the Court criticized in Berger v. New York;

(i) It fails to provide for a recordation of such conversations, through the use of or in a manner which will protect the recordings from editing or other alterations, and a return of such recordings through the Judge



issuing the orders as required by 18 U.S. Code § 2518(8) (a); and

(j) No inventory is required contrary to the provisions of U.S. Code § 2518(8) (b).

The wiretap orders issued by Judge Batjer are void for the following reasons:

(a) The order was to last for 60 days contrary to 18 U.S. Code § 2518(5);

(b) The wrong person applied for the order. Under federal legislation the only person who is authorized to apply for an interception order is the "principal prosecuting attorney of any political subdivision thereof." [18 U.S. Code § 2516(2)] Since under Nevada law the State Attorney General does not have the powers of, or perform the function of, the "principal prosecuting attorney", the application by the State Attorney General is contrary to such § 2516(2); and

(c) There was an absolute failure in the application or the order to show

probable cause that "normal" investigative procedures had been tried and had failed or reasonably appeared unlikely to succeed if tried.

For the foregoing reasons, the Nevada statutes, which form the basis for the court orders of interception in this case, are fatally deficient and the orders promulgated thereunder are void. This being the case, it is clear that the Court of Appeals should have decided that the Nevada statutes and Judge Batjer's orders were void, thereby requiring the suppression of all evidence and fruits of such evidence obtained therefrom.

This Court should grant this writ in order to decide these important constitutional questions left undecided by the Court of Appeals.

* * *

5. Certiorari should be granted to review the holding of the court below to the effect that the actions of the Petitioner were within the purview of the federal Travel Act and were thus



punishable under such act. (18 U.S. Code § 1952.)

Petitioner contends that his actions were not such as to constitute an offense punishable under the Travel Act and were of purely local concern. As such, his convictions under the Travel Act are in violation of the Tenth Amendment which reserves local matters to state control.

This Court held in Rewis v. United States, 401 U.S. 743, that the Travel Act was directed primarily at organized crime and, more specifically, toward persons who reside in one state while operating or managing illegal activities located in another state. This Court recognized that Congress could not have intended federal jurisdiction to attach to every instance in which criminal activity sometimes involved the crossing of state lines. This Court also rejected a contention by the government that federal criminal liability could be imposed whenever it could reasonably have been foreseen that instances of interstate travel would occur.

The facts, the surrounding circumstances and the offenses alleged to have been committed by the Petitioner in the case are and were of purely local concern to the State of Nevada. The actual interstate contacts in this case, enumerated in the Opinion of the court below, show that same were clearly of a purely intra-state nature with only incidental inter-state contacts. Especially important to note is that Petitioner was a resident of Nevada, the land in question was located in Nevada, and almost every person connected with the facts in this case was from Nevada.

Applying the facts in the instant case to this Court's holding in Rewis, indicates that the Court of Appeals came to an erroneous decision when it held that the Travel Act applied to this case. As such, the Tenth Amendment was violated by a federal prosecution relating to matters of purely local concern.

This Court should grant the requested writ so that the limitations



on federal prosecutions of purely local matters can be more specifically delineated.

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

GODFREY ISAAC and
LAWRENCE JAY KRAINES

Attorneys for Petitioner

# APPENDIX A



# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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|---|---|
| UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JAMES G. RYAN, *Defendant-Appellant.* | No. 75-1317 |
| UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ADRIAN WILSON, *Defendant-Appellant.* | No. 75-1314 |
| UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. BERNARD ZELDIN, *Defendant-Appellant.* | No. 75-1313 |
| | OPINION |

[May 24, 1976]

Appeal from the United States District Court
for the District of Nevada

Before: WRIGHT, KILKENNY and TRASK,
Circuit Judges

TRASK, Circuit Judge:

Adrian Wilson, Bernard Zeldin and James Ryan appeal their convictions in Federal District Court for the District of Nevada for violation of 18 U.S.C. § 1952, the so-called "Travel Act," 18 U.S.C. § 371, the federal conspiracy statute, and 18 U.S.C. § 2, the aiding and abetting statute. They make several assignments of

error, relating to the jurisdiction of the court below, the legality of evidence gathered by wiretapping and electronic surveillance and the general conduct of the government in investigating and prosecuting this case. In connection with this last issue, appellants Zeldin and Wilson also argue that the government intentionally interfered with their attorney-client privilege. In addition, appellant Ryan alleges that the evidence was insufficient to support the verdict against him as a coconspirator, appellant Wilson argues that the trial judge erred in refusing certain jury instructions, and appellants Zeldin and Ryan challenge the constitutionality of the Travel Act. For the reasons set forth below, we affirm all appellants' convictions.

Each of the appellants filed an opening brief emphasizing facts as they apply to his particular case. Mindful of these individual variations we review the facts in their entirety, considering them in the light most favorable to the government, which is the appropriate standard for appellate review of judgments of conviction. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Munns*, 457 F.2d 271 (9th Cir. 1971).

The case revolves around the attempt of appellant Wilson, a well-known architect and resident of Los Angeles, to have certain land he owned in Nevada approved for rezoning and acts of bribery committed to achieve this purpose. The rezoning decision was to be made by the Clark County Board of Commissioners. The central figure in this episode was one Miro Mizera, an unindicted coconspirator, a Czechoslovakian refugee in ill health and a licensed realtor in the Las Vegas area.

Mizera was interested in helping Wilson subdivide and sell his property. He visited Wilson in January 1972 in Los Angeles and told Wilson that rezoning could be accomplished only if a political contribution to the county commissioners were made. Mizera agreed to talk with Commissioner Ryan about this matter.

Mizera thereafter held a series of meetings with Ryan. At the first meeting, Ryan told Mizera that prospects for approval of the application were favorable. No discussion of a bribe or campaign contribution was made until the second meeting, when Mizera mentioned a $10,000 political contribution. After the Planning Commission, an advisory body, recommended rejecting the rezoning



plan, Ryan told Mizera that he (Mizera) would have to approach the other four commissioners himself.

Mizera was given an unenthusiastic reception by Commissioners Leavitt, Brennan, Wiesner and Broadbent, although all of them at least indicated to Mizera that the prospects for eventual approval of the plan were good. After meeting with Mizera on April 24, 1972, Broadbent telephoned the state Attorney General and informed him that he thought Mizera had offered a bribe in exchange for his vote. Broadbent then agreed to cooperate with state authorities by "playing along" with Mizera and recording all conversations with him.

The following day, the Board of Commissioners voted to continue consideration of the application until May, when Wilson could more conveniently be in Nevada. Shortly thereafter, Mizera contacted a Las Vegas attorney, Morris, to inquire about the possibility of representing Wilson at the hearing. Exactly what terms were discussed between Morris and Mizera is subject to dispute, but it appears that Morris was informed of the bribery scheme. In any event, a retainer agreement between Morris and Wilson was consummated. Mizera then told Broadbent that Morris would be representing Wilson in the forthcoming commission meeting and detailed the scheme as it then stood. This conversation was recorded.

On April 27, 1972, Broadbent, acting through an intermediary, Reeves, told Morris that he was being led into a trap and that he should get out of the affair altogether. Morris then withdrew from the retainer agreement, returning the fee Wilson had paid him. This contact between Broadbent, who was serving as a government informer, and Morris gives rise to one of the issues on appeal.

Mizera continued to meet with Broadbent and Ryan in May. His purpose at this time was to have one of them take control of the bribery plot and work to ensure the votes of the other commissioners. In particular, Mizera wanted one of them to make the motion for rezoning at the meeting. On May 16, 1972, Broadbent, at the behest of state agents, told Mizera that he had to back out of the deal and would not be able to support the zoning application. There was no further contact between Mizera and Broadbent until after the Commission meeting.

Mizera was also in contact with appellant Zeldin during this time. Zeldin was a local businessman who was to take charge of the development of Wilson's land after approval of the rezoning plan. Zeldin went to Los Angeles to confer with Wilson concerning the bribery scheme and to obtain the bribery money which Wilson had borrowed from a Los Angeles bank. This interstate trip formed part of the basis for the indictment under 18 U.S.C. § 1952, the Travel Act.

After Broadbent withdrew from the plot, Mizera telephoned Zeldin, who was in Los Angeles, and the two discussed the problem of which commissioner would make the motion for approval of the application. This interstate conversation also formed part of the section 1952 indictment. The following day, May 17, 1972, Mizera met with Ryan and at this time Ryan said that he would make the motion. Thereafter, Mizera again telephoned Zeldin in Los Angeles.

On May 19, 1972, Mizera was approached by state agents and informed of the evidence they had amassed against him through his conversations with Broadbent. The state agents offered Mizera immunity from prosecution in return for his assistance. From that point forward, Mizera was a state agent whose conversations were recorded. The tactics of the government in obtaining Mizera's cooperation give rise to another important issue in this appeal.

The bribery scheme was discussed and recorded in a conversation between Ryan and Mizera that very evening. Mizera also met with Wilson, who had flown in from Los Angeles on May 21st for the commissioners' meeting the following day, at which time the distribution of the bribery money among the commissioners was discussed. This conversation was also recorded.

The commissioners met on May 22nd. Commissioner Ryan made the motion, and the zoning application was approved. Mizera, Wilson and Zeldin then caucused in a motel room and Mizera was given the money to distribute to the commissioners. State agents monitored this entire meeting through a transmitting device Mizera carried on his person. The following day, Mizera went to Ryan's home and gave him the bribery money, which Ryan accepted. Immediately thereafter, state agents, who had been hiding in the trunk of Mizera's car, arrested Ryan.



I.

The first count of the indictment charged all appellants with conspiring to violate the Travel Act, 18 U.S.C. § 1952,[1] the second with violating the Travel Act and aiding and abetting therein, pursuant to 18 U.S.C. § 2.[2] In a case where jurisdiction depends upon the interstate nature of the criminal activity, as with section 1952, section 2 considerably eases the prosecutor's burden. Because of section 2, he does not have to show the interstate nature of each defendant's activity, but rather that the scheme as a whole had substantial interstate connections. If it did, he must then prove that each defendant aided or abetted the scheme to make out his violation of section 1952 against each defendant. It is for this reason that, in deciding the jurisdictional question, our primary focus is upon the scheme as a whole.

[1] 18 U.S.C. § 1952 states:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

"(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

[2] 18 U.S.C. § 2 states:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Appellants urge that the offenses committed here were matters of local concern; that there was no connection between the interstate travel and usage of interstate facilities and what they characterize as an "isolated local offense." Appellants argue that *Rewis v. United States*, 401 U.S. 808 (1971), is dispositive of the question of jurisdiction and mandates a finding that the acts committed in this case do not come within the ambit of section 1952. In that case, petitioners conducted an illegal lottery in Florida, just south of the Georgia-Florida state line. Although there was no evidence that petitioners themselves crossed state lines in connection with the lottery, several of the patrons of the lottery did so. On these facts, the Court held section 1952 inapplicable.

We do not find that *Rewis* supports appellants' position. We note specifically that the Court in *Rewis* cited with approval three lower court cases in which the organizers of an illegal scheme either traveled in interstate commerce or caused other organizers —as opposed to patrons—to do so.[3] These cases, Justice Marshall said, "correctly applied § 1952 to those individuals whose agents or employees cross state lines in furtherance of illegal activity." 401 U.S. at 813. We find the facts of these cases, all involving illegal gambling operations, much closer to our case than those of *Rewis*, since we are confronted with no parties comparable to the patrons of *Rewis*.

This court reads the statute as broadly as *Rewis* will permit. In *United States v. Roselli*, 432 F.2d 879, 890-91 (9th Cir. 1970, a pre-*Rewis* case, we took a broad view of the act, rejecting a wide variety of challenges to its applicability which would have narrowed the act considerably. This broad construction was cited with approval in *United States v. Colacurcio*, 499 F.2d 1401, 1405-06 (9th Cir. 1974), a case decided well after *Rewis*.

Applying this general framework to appellants' case, we have no difficulty in concluding that this scheme comes well within the ambit of the statute. Mizera and Zeldin traveled in interstate commerce to discuss the rezoning with Wilson in California. Wilson gave Zeldin $10,000 to transport from California to

[3]United States v. Chambers, 382 F.2d 910 (6th Cir. 1967); United States v. Barrow, 363 F.2d 62 (3d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967); United States v. Zizzo, 338 F.2d 577 (7th Cir. 1964), *cert. denied*, 381 U.S. 915 (1965).





Nevada. Wilson traveled from California to Nevada to attend the county commissioners' hearing. Zeldin took part in at least two interstate telephone conversations with Mizera.[4]

II.

Evidence obtained by electronic surveillance and wiretapping in the investigation of this case can be divided into three types. First, state agents obtained evidence through wiretaps on the phone of Broadbent, the county commissioner who served as a government informant, as well as a "body tap" placed on Broadbent. A court order pursuant to state statute was obtained for the telephone tap but not the body tap. No party disputes that Broadbent's consent was obtained for both forms of electronic surveillance. Second, a wiretap order was issued pursuant to the same Nevada statute on May 4, 1972, permitting state agents to wire Mizera's residence and office, and to tap telephones in those places. Many conversations were recorded under this order between May 5th and May 19th, but only those involving Broadbent were offered at trial. Third, on May 19, 1972, Mizera agreed to cooperate with government authorities and also to allow his conversations, both telephone and personal, to be taped.

As to the first type of wiretap evidence, the law in this circuit is clear that one party's consent is sufficient justification for electronic surveillance and no prior judicial authorization is required. *Holmes v. Burr*, 486 F.2d 55 (9th Cir. 1973). Since no party disputes that Broadbent's consent was freely given, any evidence derived from this wiretap is free from challenge.

As to the second type, we note that none of these tapes (except those which also involved Broadbent) were introduced at trial. Pursuant to the command of *Alderman v. United States*,

[4]Appellants Zeldin and Ryan also argue that the Travel Act is unconstitutional as impermissibly vague or an infringement of the powers reserved to the states in the tenth amendment. Contentions of this nature have been consistently rejected both by this court and other circuits. United States v. Cozetti, 441 F.2d 344, 348 (9th Cir. 1971); United States v. Nichols, 421 F.2d 570, 574 (8th Cir. 1970); Turf Center, Inc. v. United States, 325 F.2d 793, 795-96 (9th Cir. 1963). By contrast, appellants have cited no cases holding the statute unconstitutional and we know of none.

394 U.S. 165 (1969), a hearing after the trial was nonetheless held to determine "the nature and relevance to [their] conviction of any conversations which may have been overheard," *Alderman, supra,* at 186. At this hearing, the district court ruled that the government had an independent source, Broadbent, for all information obtained by the wiretap on Mizera's phones during the period between May 5th and May 19th. The court also ruled that Mizera himself became an independent source of this same evidence after May 19th, when he agreed to cooperate with the authorities and told them all that had gone on prior to that time. No appellant was able to demonstrate to the court's satisfaction that evidence used at trial, or leads to evidence used at trial, were discovered as a result of these intercepts. Therefore, the court concluded that aside from the independent sources, "the information or leads obtained [from the Mizera wiretap before May 19th] were insignificant and insubstantial." After a thorough review of the evidence presented at this hearing and the arguments of counsel on behalf of their clients, we are not "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). We therefore affirm the trial court's conclusions.

Finally, we hold admissible on the basis of one party's consent evidence obtained from taps on Mizera's telephone and person after May 19th. *Holmes v. Burr, supra.* The question of Mizera's consent is discussed in more detail in Part III, *infra.*

## III.

Appellants' arguments are also directed at the manner in which the government enlisted Mizera as a government informant. They claim that their due process rights have been violated by the government's treatment of Mizera. They would have us dismiss the indictment altogether on due process grounds, or, at the very least, exclude all evidence procured from the Mizera wiretap after May 19th.

Appellants rely particularly on Justice Rehnquist's statement in *United States v. Russell,* 411 U.S. 423, 431-32 (1973), that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due



process principles would absolutely bar the government from invoking judicial processes to obtain a conviction" and argue that this is precisely that type of situation. Appellants' reliance upon this passage from *Russell* has two distinct bases.

*Russell* was directed specifically toward a consideration of the nature of the entrapment defense. Appellants faintly argue that *Mizera* forced them to commit criminal acts they would not otherwise have committed. This, of course, would be entrapment under the *Russell* standard. They argue more strenuously, however, that *Russell* considered entrapment from another perspective—the so-called "objective approach," where the focus is not on the "propensities and predisposition of a specific defendant, but on 'whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power.'" *Russell, supra* at 441 (Stewart, J., dissenting). While the Court's opinion in *Russell* very clearly excludes use of the "objective approach" in most entrapment cases, the above-quoted passage of Justice Rehnquist for the Court does indicate that this approach may in certain limited instances be appropriate.

In examining the circumstances surrounding the government's confrontation with Mizera, in which he agreed to cooperate with government authorities, and Mizera's activities thereafter, we conclude that, measured against the *Russell* standard, the government's conduct did not rise to the level of a violation of appellants' due process rights. Government agents first read to Mizera the Nevada bribery statute, the "unlawful activity" which served as the predicate for the section 1952 indictment, and then recited some of the evidence they had amassed against him. Thereafter, it is undisputed that this "conversation" included the following factors:

1. Repeated assertions to Mizera that he *would* go to jail for 10 years if he refused to cooperate (10 years was the maximum sentence; the statute allows for 1-10 years imprisonment and no defendant was ultimately given the maximum).

2. Admonitions to Mizera not to get an attorney or his "usefulness" to state agents would be over.

3. Prophecies that his health would suffer irreparably if he went to jail.

4. Assurances that his friends, Wilson and Zeldin, would be kept "out of it."

5. Reminders that if he did not help obtain sufficient evidence against Ryan, he himself would be indicted.

This court does not condone the tactics used to gain Mizera's co-operation. We explicitly disagree with the lower court, which characterized the government's efforts as "excellent professional police work." On the basis of the applicable legal standards derived from *Russell*, however, we find that this treatment of Mizera does not violate appellants' due process rights. This court has emphasized that the due process channel which *Russell* kept open is a most narrow one, to be invoked only when the government's conduct is so grossly shocking and so outrageous as to violate the universal sense of justice. *United States v. Luc*, 498 F.2d 531, 534 (9th Cir. 1974). The government's conduct, while not exemplary, does not rise to this level. *See Hampton v. United States*, 44 U.S.L.W. 4542, 4543-44 (April 27, 1976).

Nor does the government's treatment of Mizera and his acts as a government agent constitute entrapment in the "subjective," *Russell* sense. "It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play" *Russell* teaches, 411 U.S. at 436.[5] Here, the government enlisted Mizera's cooperation when the conspiracy was in a very advanced stage, just prior to its culmination on May 22nd. The conspiracy had been ongoing since at least January of that year.

Moreover, there is no evidence that Mizera's course of conduct changed in any sense after his enlistment on May 19th or that he influenced any of the appellants to change their course of conduct after he became a government agent. He continued to meet and

[5]For this reason we reject Wilson's contention that the trial court's refusal to give entrapment instructions relating to Broadbent's contact with Wilson was reversible error. There is no indication that Wilson posed any objection to the trial court's refusal to give his proposed instructions and normally a failure to object will preclude appellate review. Fed. R. Crim. P. 30; 5A *Moore's Federal Practice* ¶ 51.04. Even if he had posed a timely objection, however, his proposed instructions would have presented to the jury statements of the law based upon an "objective standard" and therefore at odds with *Russell's* clear holding. They were thus properly rejected.



discuss the bribery plan with Ryan. Wilson had previously made a commitment to come to Las Vegas on May 21st, and, as planned, Mizera met with him then, at which time the distribution of the bribery money was discussed. Zeldin was also present at this meeting, as planned. The argument that Mizera emplanted a criminal intent in unwilling participants at this late stage is transparently implausible.

For similar reasons, we are unpersuaded by appellants' argument that Mizera's decision to cooperate was coerced. Simply stated, Mizera had no practical alternative. Once the statute was read to him and he was confronted with the evidence the state held against him, Mizera was capable of determining that he faced an almost certain prison sentence. At that point, Mizera could have decided that cooperation with the authorities was in his self-interest and indeed his only hope of staying out of prison. While we would have preferred that the government had shown more restraint after confronting Mizera with the evidence against him, nothing said or done thereafter was likely to change his decision. We therefore hold that all wiretap and electronic surveillance evidence derived from Mizera's conversations after May 19th was properly admitted on the basis of one party's consent. *Holmes v. Burr*, 486 F.2d 55 (9th Cir. 1973).

Appellants Zeldin and Wilson raise an independent due process argument regarding the contact between Broadbent, who, it will be recalled, was also a government informant, and Morris, Wilson's retained attorney. It is undisputed that Broadbent approached Morris through an intermediary on April 27, 1972, and told Morris that he was being led into a trap, after which Morris withdrew from representing Wilson. Beyond this, however, the circumstances surrounding this contact are shrouded in mystery.

It is not clear, for example, on what basis Zeldin claims his due process rights were violated by Broadbent's contact. Morris testified at trial that he never met Zeldin prior to April 27, 1972. Zeldin claims at one point that he had agreed to enter into a partnership with Wilson, while at another point he states he *was* in partnership with Wilson at the time of this alleged interference. Nor do we know the terms of the Morris-Wilson retainer agreement whether Wilson retained Morris for the alleged Wilson-Zeldin partnership, individually, or on some other basis.

In any event, all the evidence indicates that Broadbent was acting independently and out of concern for a long-time friend in urging Morris to remove himself from the case. There is absolutely no evidence that Broadbent consulted with state agents before approaching Morris or that the state was in any manner involved in this contact. While we do not hold that the government can always fall back on conventional agency principles to disclaim responsibility for acts committed by its informants, we do hold that on these unique facts no due process violation in the *Russell* sense transpired.

IV.

Appellant Ryan contends that the evidence was insufficient to support the verdict against him as a coconspirator. He argues that his participation in the conspiracy can only be proved by acts committed prior to May 19, 1972, the date Mizera became a state agent, on the theory that a person cannot conspire with himself and one who is acting as a government agent is incapable of being a member of a criminal conspiracy. Accepting, *arguendo*, the appropriateness of this principle in this case, we find the evidence more than sufficient to support the verdict.

Ryan met with Mizera on numerous occasions to discuss the rezoning. At the second of these meetings, in February of 1972, campaign contributions in exchange for a favorable vote were mentioned. Ryan did not repudiate the scheme at that time, as Broadbent had done upon first becoming aware of it. Rather, he continued to meet with Mizera concerning this rezoning. While the bribe was not specifically discussed in the March meeting, it is difficult to imagine that Ryan assumed that Mizera had dropped his original proposal. In April of 1972, Ryan did repudiate the plan altogether because his share of the "kitty" had been reduced, but resumed his role in the scheme shortly thereafter, when Mizera told him that he would receive $3,000 rather than the $2,000 originally promised. Finally, on May 17, 1972, Ryan told Mizera that he would make the necessary motion at the commission meeting.

In analyzing Ryan's role in the conspiracy, it is important to keep in mind that Mizera had been rebuffed by all the other commissioners (except, of course, Broadbent, who was serving as an informant). Thus, without Ryan's cooperation with Mizera up to May 17th, the conspiracy almost certainly would have dissolved.



This court has repeatedly held that once a conspiracy is established, as it was here abundantly, only slight evidence is necessary to support a jury verdict that an individual defendant was a member. *United States v. Turner*, 528 F.2d 143, 162 (9th Cir. 1975); *United States v. Westover*, 511 F.2d 1154, 1157 (9th Cir. 1975). At the same time, we have said that mere knowledge of the existence of a conspiracy or mere association with a conspirator is insufficient to sustain a conviction. *United States v. Basurto*, 497 F.2d 781, 793 (9th Cir. 1974). The government must show that a defendant had a "stake in the venture." *United States v. Cianchetti*, 315 F.2d 584, 588 (9th Cir. 1963). We find the evidence linking Ryan to this conspiracy considerably more than "slight" and clearly indicating a stake in the illegal venture.

Accordingly, for the reasons set forth herein, the judgment of the district court is

Affirmed.

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# APPENDIX B



## § 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury. As amended Pub.L. 91-513, Title II, § 701(i) (2), Oct. 27, 1970, 84 Stat. 1282.

**§ 2516. Authorization for interception of wire or oral communications**

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h) or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnaping and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

## § 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period

longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

# APPENDIX C

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte

showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 218.



## INTERCEPTION AND DISCLOSURE OF WIRE AND RADIO COMMUNICATIONS, PRIVATE CONVERSATIONS

**200.610 Definitions.** As used in NRS 200.610 to 200.690, inclusive:

1. "Person" means every natural person, firm, copartnership, association or corporation and includes public officials and law enforcement officers of the state and of a county or municipality or other political subdivision of the state.

2. "Wire communication" means the transmission of writing, signs, signals, pictures and sounds of any and all kinds by wire, cable, or other similar connection between the points of origin and reception of such transmission, including all facilities and services incidental to such transmission, which facilities and services shall include, among other things, the receipt, forwarding and delivering of communications.

3. "Radio communication" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by radio or other wireless methods, including all facilities and services incidental to such transmission, which facilities and services shall include, among other things, the receipt, forwarding and delivering of communications. "Radio communication" shall not include the transmission of writing, signs, signals, pictures and sounds broadcast by amateurs or public or municipal agencies of the State of Nevada, or by others for the use of the general public.

(Added to NRS by 1957, 334)

**200.620 Interception, attempted interception of wire, radio communication prohibited; exceptions.**

1. Except as otherwise provided in NRS 200.660, no person shall intercept or attempt to intercept any wire or radio communication unless such interception or attempted interception is authorized by both the sender and receiver.

2. This section shall not apply to any person, or to the officers, employees or agents of any person, engaged in the business of providing service and facilities for such communication where the interception or attempted interception is for the purpose of construction, maintenance, conduct or operation of the service or facilities of such person.

(Added to NRS by 1957, 334)

**200.630 Disclosure of contents, substance of wire, radio communication prohibited; exceptions.**

1. Except as otherwise provided in NRS 200.660 to 200.680, inclusive, no person shall disclose the existence, contents, substance, purport, effect or meaning of any wire or radio communication to any person unless authorized to do so by either the sender or receiver.

2. This section shall not apply to any person, or the officers, employees or agents of any person, engaged in furnishing service or facilities for such communication where such disclosure is made:

(a) For the purpose of construction, maintenance, conduct or operation of the service or facilities of such person; or

(b) To the intended receiver, his agent or attorney; or

(c) In response to a subpena issued by a court of competent jurisdiction; or

(d) On written demand of other lawful authority.

(Added to NRS by 1957, 334)

**200.640 Unauthorized connection with facilities prohibited.** Except as otherwise provided in NRS 200.660 to 200.680, inclusive, no person shall make any connection, either physically or by induction, with the wire or radio communication facilities of any person engaged in the business of providing service and facilities for such communication unless such connection is also authorized by the person providing such service and facilities.

(Added to NRS by 1957, 335)

**200.650 Unauthorized, surreptitious intrusion of privacy by listening device prohibited.** Except as otherwise provided in NRS 200.660 to 200.680, inclusive, no person shall intrude upon the privacy of other persons by surreptitiously listening to, monitoring or recording, or attempting to listen to, monitor or record, by means of any mechanical, electronic or other listening device, any private conversation engaged in by such other persons, or disclose the existence, contents, substance, purport, effect or meaning of any such conversation so listened to, monitored or recorded, unless authorized to do so by one of the persons engaging in the conversation.

(Added to NRS by 1957, 335)

**200.660 Court order for interception; Contents of application; effective period; renewals.**

1. An ex parte order for the interception of wire or radio communications or private conversations may be issued by the judge of a district court or of the supreme court upon application of a district attorney or of the attorney general setting forth fully the facts and circumstances upon which the application is based and stating that:

(a) There are reasonable grounds to believe that the crime of murder, kidnaping, extortion, robbery, bribery or crime endangering the national defense or a violation of chapter 453 of NRS or the dangerous drug law as provided in chapter 454 of NRS has been committed or is about to be committed; and

(b) There are reasonable grounds to believe that evidence will be obtained essential to the solution of such crime or which may enable the prevention of such crime; and



(c) No other means are readily available for obtaining such evidence.

2. Where statements in the application are solely upon the information or belief of the applicant, the precise source of the information and the grounds for the belief must be given.

3. The applicant must state whether any prior application has been made to intercept private conversations or wire or radio communications on the same communication facilities or of, from or to the same person, and, if such prior application exists, the applicant shall disclose the current status thereof.

4. The application and any order issued under this section shall identify fully the particular communication facilities on which the applicant proposes to make the interception and the purpose of such interception.

5. The court may examine, upon oath or affirmation, the applicant and any witness the applicant desires to produce or the court requires to be produced.

6. Orders issued under this section shall not be effective for a period longer than 60 days, after which period the court which issued the order may, upon application of the officer who secured the original order, in its discretion, renew or continue the order for an additional period not to exceed 60 days. All further renewals thereafter shall be for a period not to exceed 30 days.

(Added to NRS by 1957, 335; A 1971, 853)

**200.670 Application for order, documents, testimony confidential; disclosure of information prohibited.**

1. During the effective period of any order issued pursuant to NRS 200.660, or any extension thereof, the application for any order under NRS 200.660 and any supporting documents, testimony or proceedings in connection therewith shall remain confidential and in the custody of the court, and such materials shall not be released nor shall any information concerning them be disclosed in any manner except upon written order of the court.

2. No person shall disclose any information obtained by reason of an order issued under NRS 200.660, except for the purpose of obtaining evidence for the solution or prevention of a crime enumerated in NRS 200.660, or for the prosecution of persons accused thereof, unless such information has become a matter of public record in a criminal action as provided in NRS 200.680.

(Added to NRS by 1957, 336)

**200.680 Admissibility of information in evidence.**

1. Any information obtained, either directly or indirectly, as a result of a violation of NRS 200.620, 200.630, 200.640 or 200.650 shall not be admissible as evidence in any action.

2. Any information obtained, either directly or indirectly, pursuant to an effective order issued under NRS 200.660 shall not be admissible in any action except:

(a) It shall be admissible in criminal actions involving crimes enumerated in NRS 200.660 in accordance with rules of evidence in criminal cases; and

(b) In proceedings before a grand jury involving crimes enumerated in NRS 200.660.

(Added to NRS by 1957, 334)

**200.690 Penalties.** Any person who willfully and knowingly violates NRS 200.620, 200.630, 200.640, 200.650 or 200.670 is guilty of a gross misdemeanor.

(Added to NRS by 1957, 336; A 1967, 474)

No. 76-96

# In the Supreme Court of the United States

OCTOBER TERM, 1976

BERNARD ZELDIN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

## JURISDICTION

The judgment of the court of appeals was entered on May 24, 1976. A petition for rehearing was denied on June 28, 1976. The petition for a writ of certiorari was filed on July 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether recorded conversations of petitioner and various co-conspirators relating to a scheme for bribing local zoning officials were properly admitted into evidence at petitioner's trial.

2. Whether petitioner's interstate travel and use of facilities of interstate commerce in aid of a scheme to bribe local zoning officials constituted a violation of 18 U.S.C. 1952.

## STATUTE INVOLVED

18 U.S.C. 1952 provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to
>
> * * * * *
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means * * * (2) extortion, bribery, or arson in violation of the laws of the State in which commited or of the United States.

## STATEMENT

After a jury trial in the United States District Court for the District of Nevada, petitioner was convicted of interstate travel and use of the facilities of interstate commerce in aid of a scheme to bribe local zoning officials and of conspiring to commit that offense (18 U.S.C. 1952, 2, 371).[1] He was sentenced to concurrent terms of imprisonment for a year and a day on

[1]Two co-defendants, Adrian Wilson and James G. Ryan, were also convicted on these charges.



each count and was fined $10,000 on each count. The court of appeals affirmed in a comprehensive opinion (Pet. App. A).

1. Co-defendant Adrian Wilson, who resided in Los Angeles, California, owned a parcel of land in Clark County, Nevada. Wilson sought a favorable rezoning of this property by the Clark County Board of Commissioners, then consisting of commissioners Broadbent, Leavitt, Brennan, Wiesner and co-defendant Ryan. Petitioner is a local businessman who was to take charge of the property after the rezoning (Pet. App. 4).

Mira Mizera, a Nevada realtor, offered his services to Wilson when he learned of the latter's desire to rezone and develop his Clark County property. In a January 1972 meeting in Los Angeles, Mizera told Wilson that rezoning could be accomplished only if the county commissioners were given "political contributions" (1B Tr. 16-18).[2] He suggested a $10,000 figure and volunteered to contact the commission members (1B Tr. 19). Subsequently, Mizera met with Commissioner Ryan to discuss the rezoning plan. In a second meeting, in February 1972, he told Ryan that the latter would receive a $10,000 contribution for his assistance (1B Tr. 21-27). At another meeting in late March or early April, Ryan told Mizera that he did not want to approach the other commissioners personally on the Wilson matter and that Mizera would have to solicit their support himself (1B Tr. 29-30; 1C Tr. 287).

[2]"1A Tr. " etc. refers to the volume (1A through 1J) and page of the transcript of the testimony of particular witnesses on particular trial days, or of other proceedings. Volume 1G consisted of volumes IV through VIII of trial testimony and is cited, *e.g.*, "1G IV Tr."

Wilson had introduced Mizera to petitioner in Las Vegas and had described petitioner as the developer for his tract. At a later meeting, Mizera advised petitioner that he had unsuccessfully attempted to contact the campaign manager for Commissioner Leavitt. Petitioner then said that he would handle the matter himself (1B Tr. 99). Mizera met with Commissioner Leavitt and told him that Wilson would contribute $3,000 if the rezoning were approved. Leavitt responded only that he was not interested in a campaign contribution and that he would consider the application on its merits (1G IV Tr. 569-595). Leavitt subsequently received a call from his campaign manager, who asked him about the Wilson application and told him that it was petitioner's "deal" (1G IV Tr. 577, 588, 595).

2. On April 20, 1972, Mizera contacted Commissioner Broadbent. Mizera offered him a $2,000 contribution, and Broadbent feigned interest. When Mizera left, Broadbent immediately called the State Attorney General's Office. Broadbent met with state investigators and agreed to have his subsequent telephone or face-to-face conversations with Mizera recorded (1 E Tr. 393, 405, 507).[3] Mizera and Broadbent met again on May 2, 1972. At this meeting Mizera told Broadbent of Commissioner Ryan's involvement in the plan and of petitioner's intent to solicit the aid of Commissioner Leavitt's campaign manager (1E Tr. 407-413).[4] At this point in the investigation, the state

[3]Out of an abundance of caution, the state authorities also secured a court order pursuant to a Nevada law, Nev. Rev. Stats. 200.660 (1971), authorizing the interception of Broadbent's telephone calls.

[4]Mizera also contacted Commissioners Brennan and Wiesner and offered them funds in exchange for a favorable zoning vote. Both rejected his offer and insisted that they would examine Wilson's rezoning application on its merits. Brennan eventually voted against the plan, while Wiesner supported it (1B Tr. 42-44; 1G IV Tr. 630-641; 1G IV Tr. 612).



agents commenced wire interception of Mizera's office and home telephones, pursuant to a state court order under Nevada law. The wire interception was to last from May 5 until May 19, 1972.

Meanwhile, on May 9, 1972, co-defendant Wilson applied in Los Angeles for a $12,000 loan.[5] On May 10, Mizera again called Broadbent to confirm his support for the rezoning and told him, somewhat inaccurately, that the $10,000 had actually been obtained and that petitioner had it. On May 16, at the request of the state investigators, Broadbent told Mizera that he could no longer support the rezoning plan (1E Tr. 424, 425). Disturbed, Mizera called petitioner, who was then in Los Angeles, and asked if "his man" Leavitt would make the motion to approve rezoning. Petitioner later called back and said that while Leavitt would support the proposal, he would not introduce it (1B Tr. 101-103). Mizera then contacted Ryan and persuaded him to make the motion, in return for $5,000 (1B Tr. 61; 1C Tr. 302-304, 356). The realtor then called petitioner in Los Angeles again, told him that all was well, and asked him to assure that Wilson would have the money in Las Vegas after the Board of Commissioners met (1B Tr. 104, 105). The same day, petitioner went to Wilson's office in Los Angeles and received some $11,000 in cash from him in $100 bills. This was to be delivered to Mizera only if the zoning proposal passed (1G VIII Tr. 1456-1490).

[5]On April 26 or 27, Wilson secured the services of a Nevada attorney, William Morris, to help pursue the rezoning application. Mizera told Broadbent about Morris, who in fact was a close friend of the commissioner. Not wanting his friend to become involved in the bribery investigation, Broadbent sent word to Morris that he should withdraw, and the attorney thereupon terminated his representation of Wilson. Broadbent's activity in this regard was done in his personal capacity, without informing the state authorities (1E Tr. 432-468; 1G VIII Tr. 1551-1578).

3. At this point, through Broadbent's cooperation the state investigators were aware of the general nature of the scheme. They concluded, however, that Mizera's assistance was necessary to discover all participants in the affair. On May 19, 1972, state agents disclosed to Mizera their investigation of the developing bribe scheme. They first read to him the relevant Nevada bribery statute and described some of the evidence they had gathered against him. They offered him immunity from prosecution if he cooperated. This would permit him to retain his real estate license. The agents also toid him that if he did not help secure sufficient evidence, he would be indicted; that he would go to jail for the maximum of 10 years; that he should not get an attorney or his usefulness would be over; that his health would suffer in jail and that his friends, petitioner and Wilson, would be "kept out of it" (Pet. App. 9-10). Mizera agreed to cooperate, and thereafter his telephone and personal conversations were recorded with his consent.

Mizera met Wilson in Las Vegas on May 21, 1972, and described how the $11,000 was to be distributed (1B Tr. 79-94). The Board of Commissioners met on May 22, 1972, and Ryan moved to rezone the Wilson property. The motion passed, with Ryan, Wiesner, and Leavitt voting in favor of it. Mizera then met with petitioner and Wilson. Petitioner gave the realtor an envelope containing $8,000 in cash. Bank wrappers on the bills showed that the currency came from the Security Pacific Bank in Los Angeles, where Wilson had borrowed the funds (1D Tr. 12). The next day, Mizera met with Ryan, gave him the $5,000 promised, and then signaled nearby agents, who moved in and arrested the commissioner.

## ARGUMENT

1. Petitioner contends (Pet. 19-26) that the Nevada wire interception statute (Nev. Rev. Stat. 200.660 (1971)



(Pet. App. C)) is unconstitutional and that the interception orders issued pursuant thereto in the course of this investigation were unlawful. This issue was not resolved by the courts below and is not appropriate for resolution by this Court in the present context, since neither the conversations monitored under the Mizera interception orders nor fruits thereof were introduced into evidence at petitioner's trial.

After trial, the district court conducted a taint hearing, as a result of which it concluded that no significant information had been derived from the overhearings here challenged, and that in any event the information that Broadbent had obtained from his dealings with Mizera and voluntarily passed on to investigators constituted an independent source for any "leads" arguably contained within the taped conversations.[6] This purely factual conclusion was upheld by the court of appeals (Pet. App. 8) and does not warrant review by this Court.

2.a. Petitioner does not challenge the established rule that oral communications may properly be intercepted if one party to the conversation consents. *United States* v. *White*, 401 U.S. 745; 18 U.S.C. 2511(2)(c). However, relying on *Rochin* v. *California*, 342 U.S. 165, and *United*

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[6]Many of the challenged conversations were between Mizera and persons other than petitioner. Petitioner has standing to challenge the admissibility only of conversations in which he himself participated or the fruits of his overheard conversations. *Alderman* v. *United States*, 394 U.S. 165. While petitioner's co-defendants availed themselves of the opportunity to present evidence at the taint hearing, petitioner made no showing that evidence useful against him was derived from overhearings of his conversations with Mizera, intercepted pursuant to state court order. As the district court observed, "[petitioner] doesn't really comply at all with the Court's order [convening the taint hearing], filed no brief * * * [and] has wholly failed to show with any specificity what evidence was shown at the trial and what lead the state investigator or federal prosecutor came upon as a result of those conversations that were monitored" (1J Tr. 168-169).

*States* v. *Russell*, 411 U.S. 423, petitioner challenges the means by which the state agents secured Mizera's cooperation and consent to record his conversations after May 19. He contends that those means were "so outrageous" as to violate due process (Pet. 7-15).

Since the actions of the state agents were directed towards Mizera and not petitioner, the latter has no standing to challenge their activities. As was observed only last Term in *Hampton* v. *United States*, No. 74-5822, decided April 27, 1976, the Due Process Clause may be invoked "* * * only when the government activity in question violates some protected right of the *defendant*" (slip op. 6; emphasis in original). Cf. *Fisher* v. *United States*, No. 74-18, decided April 21, 1976; *United States* v. *Miller*, No. 74-1179, decided April 21, 1976; *Brown* v. *United States*, 411 U.S. 223. In any event, assuming *arguendo* petitioner's standing, his claim is without substantial basis.

While the court of appeals did not "condone the tactics used to gain Mizera's co-operation" (Pet. App. 10), it correctly held that the state agents' conduct was not "so outrageous" as to violate due process. *Russell*, *supra*, 411 U.S. at 431. This is not a case in which the innocent associate of a suspect is browbeaten with threats of criminal punishment having no basis in fact, in order to secure his cooperation. The evidence with which the agents confronted Mizera was accurate. Even more important, there was no causal connection between the agents' misconduct and Mizera's decision to cooperate. Mizera's predicament arose not from the agents' statements but simply from his awareness that the state authorities knew of his involvement in the bribery scheme. As the court below noted, "nothing said or done thereafter was likely to change his decision" (Pet. App. 11). The mere fact that an individual's cooperation is generated by a desire for leniency does not, of course, render that cooperation involuntary, let alone approximate the gross physical invasion of *Rochin*. Just as a guilty



plea is not void when made to secure a lesser sentence,[7] so too a consent to interception of oral communications is valid when motivated by similar considerations.[8]

Indeed, the reasoning in *Hampton* v. *United States*, *supra*, is applicable here. There the plurality concluded that the Due Process Clause would apply to untoward police conduct only if the challenged activity had violated a specific "protected right of the defendant" (slip op. 6). In this case petitioner invokes only a claim to the continued cooperation of a confederate in concealing a crime. The very statement of this "right" reveals its specious nature; indeed, "the police conduct here no more deprived defendant of any right secured to him by the United States Constitution than did the police conduct in *Russell* deprive Russell of any rights." *Hampton*, *supra*, slip op. 7.[9]

b. In the alternative, petitioner argues (Pet. 18-19) that under *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248-249, the agents' conduct rendered Mizera's consent involuntary. While *Schneckloth* involved a quite different question of the standards for assessing the validity of a consent given by the defendant himself, we recognize that petitioner may be entitled by virtue of 18

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[7] See, *e.g.*, *Brady* v. *United States*, 397 U.S. 742, 751.

[8] See, *e.g.*, *United States* v. *Osser*, 483 F. 2d 727, 730 (C.A. 3), certiorari denied, 414 U.S. 1028; *United States* v. *Dowdy*, 479 F. 2d 213 (C.A. 4), certiorari denied, 414 U.S. 823; *United States* v. *Silva*, 449 F. 2d 145 (C.A. 1), certiorari denied, 405 U.S. 918; *United States* v. *Jones*, 433 F. 2d 1176 (C.A. D.C.), certiorari denied, 402 U.S. 950.

[9] Petitioner also contends that the agents' discussion with Mizera deprived petitioner of a "fair trial" (Pet. 14). Since the challenged conduct occurred only during the investigatory phase of the case, petitioner's subsequent trial was not affected.

U.S.C. 2511(2)(c) to challenge the voluntariness of Mizera's consent. Here again, however, petitioner's claim is confounded by the finding of the lower courts that Mizera's consent was a voluntary decision resulting from the predicament with which he was legitimately confronted by the agents' disclosure of the evidence they had accumulated against him.[10]

3. Relying on *Rewis* v. *United States*, 401 U.S. 808, petitioner contends that federal jurisdiction under 18 U.S.C. 1952 was improperly invoked in this case. *Rewis* reversed a conviction under Section 1952 because the only demonstrated use of interstate facilities consisted of travel by gambling house patrons across state lines in order to frequent the establishment. *Rewis* nonetheless approved (401 U.S. at 813) the holdings of three courts of appeals that Section 1952 was correctly applied to

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[10]In *United States* v. *Bonanno*, 487 F. 2d 654, 658 (C.A. 2), the court noted:

> In cases involving physical search, the person alleged to have consented is doing something apparently contrary to his own interests or to those of another who often is in some way connected with him. An informer's consent to the monitoring or recording of a telephone conversation is an incident to a course of cooperation with law enforcement officials on which he has ordinarily decided some time previously and entails no unpleasant consequences to him. Hence, it will normally suffice for the Government to show that the informer went ahead with a call after knowing what the law enforcement officers were about.

The agents' discussion with Mizera on May 19 was itself recorded and was considered by the district court in resolving petitioner's challenge to Mizera's consent.



cases in which the use of interstate commerce to promote illegal local offenses was far less extensive than in the present case.[11]

Petitioner's contention is frivolous. Section 1952 is in fact precisely directed against schemes such as that in which petitioner was involved. Petitioner's co-defendant and co-conspirator Wilson lived in the adjoining State of California, and in conjunction with him, Mizera and petitioner made extensive use of interstate facilities to pursue the Nevada bribery plan. Wilson, Mizera, and petitioner traveled between the States several times in formulating their illicit design, and all three conversed frequently through interstate phone calls. Indeed, petitioner himself carried the bribe money from California to Nevada, where it was ultimately given to Commissioner Ryan.[12]

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[11]*United States* v. *Chambers*, 382 F. 2d 910 (C.A. 6) (manager of brothel solicited taxi drivers to bring clients across state lines); *United States* v. *Zizzo*, 338 F. 2d 577 (C.A. 7), certiorari denied, 381 U.S. 915 (employees of local gambler resided across state line); *United States* v. *Barrow*, 363 F. 2d 62 (C.A. 3) (same).

[12]Broadbent's warning to attorney Morris (see p. 5, n. 5, *supra)* and the latter's subsequent withdrawal are characterized by petitioner as a governmental attempt "to sever the attorney-client relationship of petitioner" and to deny him counsel during the investigatory phase of the case (Pet. 16). There is no merit to this contention, however, for Morris was retained by Wilson, not petitioner; the attorney in fact testified that he had never met petitioner until just before trial (1G VI Tr. 1254-1255). Even if Morris had also represented petitioner, however, no error would have resulted, because Broadbent's actions in contacting Morris could not properly be imputed to the government. While Broadbent was generally cooperating with the investigators, he did not consult them before warning Morris, but acted solely in a private capacity in order to protect an old friend (Pet. App. 12).

Broadbent's actions could not, in any event, have affected petitioner's right to defend himself in a criminal action, because

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1976.

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Morris was retained solely to assist in securing the rezoning of Wilson's property. He was not retained with regard to criminal proceedings which might arise from the bribery scheme, because the co-conspirators obviously did not foresee the discovery of their scheme.